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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 183

HOUSTON FIRE AND CASUALTY INSURANCE COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

STATEMENT AS TO JURISDICTION

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 2448

HOUSTON FIRE AND CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA, ET AL.,

Defendants

STATEMENT AS TO JURISDICTION

Filed May 27, 1953

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Plaintiff-Appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

Copies of the Opinion of the District Court for the Northern District of Texas, Fort Worth Division, and Final Decree are attached hereto as Appendix A.

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Jurisdiction

The Final Decree of the District Court was dated April 14, 1953, and filed with the Clerk of the Court and duly entered on April 21, 1953. A Petition for Appeal is presented to the District Court herewith, to-wit, on May 26th, 1953. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Capital Transit Company*, 325 U. S. 357; *United States* v. *Detroit & Cleveland Navigation Company*, 326 U. S. 236; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515.

Questions Presented

(1) Whether the specially constituted Three-Judge Court of the United States District Court for the Northern District of Texas, Fort Worth Division, erred in finding that it had no jurisdiction to hear and determine the involved cause of action and in dismissing Plaintiff's Complaint.

(2) Whether the action of the Interstate Commerce Commission of June 2, and October 6, 1952, complained of were either or both such an "order" as contemplated by and within the meaning of Title 28, U. S. C., Secs. 1336, 1398, 2321, 2324, 2325 and 2284.

(3) Whether the action of the Interstate Commerce Commission of June 2, and October 6, 1952, complained of were either or both "such decision, order or requirement" as contemplated by and within the meaning of Title 49, U. S. C., Secs. 17(9) and 305(g).

(4) Whether the trial court erred in dismissing Plaintiff's Petition to Enjoin, Set Aside and Annul the Orders of the Interstate Commerce Commission complained of.

(5) Whether the trial court erred in failing and refusing

to grant the prayer of Plaintiff's Petition to Enjoin, Set Aside and Annul the Orders of the Interstate Commerce Commission complained of.

Statutes Involved

Title 28, U. S. C., Secs. 1336, 1337, 1398, 2284, 2321, 2324, and 2325.

Title 49, U. S. C., Secs. 17(9), 305(g), 305(h), and 315.

Title 5, U. S. C., Secs. 1001(c), 1001(d), 1001(e), 1002(a), and 1009(e).

Said statutes are set forth in Appendix B hereto.

Statement

Appellant, Houston Fire and Casualty Insurance Company, is a Texas corporation, duly organized and qualified to do business in the States of Texas, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Kansas, Louisiana, Maryland, Missouri, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania, Tennessee, Washington, Wyoming, and the District of Columbia. It is an insurance company operating under the jurisdiction of the Department of Insurance of the State of Texas, authorized to write a general line of casualty, fire, marine, surety and fidelity insurance in Texas and in each of the other states in which it is authorized to do business. For many years, and particularly since the effective date of the Federal Motor Carrier Act of 1935, being the first Federal regulation of motor carriers, complainant has been engaged in the business of writing a general line of casualty, fire, surety, marine, fidelity and cargo insurance for motor carriers, subject to the Federal Motor Carrier Act of 1935 (49 U. S. C. A. 301 et seq.) and filing, in accordance with the provisions of 49 U. S. C. A. 315, certificates of insurance with the Interstate Commerce Commission evidencing security for the protection of the public in behalf of such

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motor carriers, and Appellant has procured the business of and been directed to write such security in behalf of motor carrier clients in an amount in excess of a half-million dollars, and has established facilities and personnel for the writing, adjustment and maintenance of such security.

Associated Employers Lloyds, not a party to the Complaint nor this appeal, is authorized to conduct business as a Lloyds Company by the Insurance Department of the State of Texas in accordance wtih the provisions of Chapter 19, Title 78, Revised Civil Statutes of Texas, 1925, and the subscribers to such Lloyds Company and some fifteen to twenty outstanding business people principally of Fort Worth and Dallas, Texas. Associated Employers Lloyds owns all of the capital stock of Inland Investment Company, not a party to this Complaint nor appeal, and which latter Company is a banking and investment corporation, operating under the jurisdiction of the State Commissioner of Banking of the State of Texas. In turn, all of the capital stock of Houston Fire and Casualty Insurance Company, the Appellant herein, is owned by Inland Investment Company. In turn, all of the capital stock of General Insurance Corporation is owned by Houston Fire & Casualty Insurance Company, a stock casualty company operating under the jurisdiction of the Insurance Department of the State of Texas, and which is licensed and operates in Arkansas, California, Oklahoma, Arizona, Louisiana, and Texas.

At page 25 of Examination Report of Associated Employers Lloyds as of December 31, 1950, by the Department of Insurance of the State of Texas is contained the following:

> "It is the practice of the Lloyds to make substantial loans to its wholly owned subsidiary, Inland Investment Company. It is the further practice for the Lloyds to receive payment of the loans in late December and re-loan the funds in early January. The above

total (referring to commercial notes in the total of $20,750.00) represents the balance remaining in the account at December 31, 1950.

"On December 31, 1950, the Inland Investment Company repaid $1,000,000.00 of such loan. The Lloyds invested the $1,000,000.00 in Federal Government Bonds. Inland Investment Company obtained the $1,000,000.00 with which to repay the loans from a Dallas bank. In January 1951, the Lloyds sold the bonds, reloaned the $1,000,000.00 to the Inland Investment Company, and the latter Company repaid the note to the Dallas bank. The cancelled note to the bank was inspected. It provided for interest at the rate of 1½% and was due January 5, 1951. A note was made by the Inland Investment Company bearing no endorsements.

"The Lloyds receive 1½% interest on loans made to Inland Investment Company. Interest received on such loans during the period covered by this examination was verified."

By letter of February 11, 1952, the Director, Bureau of Motor Carriers, Interstate Commerce Commission, requested copies of the annual statements for the year 1951 of Associated Employers Lloyds, the Houston Fire & Casualty Insurance Company, and the General Insurance Corporation, and a copy of a financial statement of the Inland Investment Company. Copies of the annual statements of Associated Employers Lloyds, the Houston Fire & Casualty Insurance Company and the General Insurance Corporation were furnished to the Commission but no copy of the financial statement of Inland Investment Company was furnished to the Commission. Request for additional information pertaining to Inland Investment Company was made on March 11, 1952, and May 6, 1952, but such information pertaining to Inland Investment Company was not furnished to the Commission.

On June 6, 1952, the Director, Bureau of Motor Carriers, Interstate Commerce Commission, advised that on June 2, 1952, the Commission, Division 5, formally decided not to accept and approve further certificates of insurance from the involved insurance companies (General Insurance Corporation, Houston Fire & Casualty Insurance Company, and Associated Employers Lloyds) "until it receives a detailed financial statement of a wholly-owned investment corporation subsidiary", referring to Inland Investment Company.

Subsequently, the Director, Bureau of Motor Carriers, Interstate Commerce Commission advised the involved insurance companies that certain certificates of insurance would not be held subsequent to July 31, 1953, unless the financial statements and requested explanation were furnished. Subsequent to that date the Commission has refused to accept certificates of insurance for Associated Employers Lloyds, Houston Fire & Casualty Insurance Company, and General Insurance Corporation.

On August 14 and 15, 1952, one of the attorneys for the three insurance companies held conferences with W. Y. Blanning, Director, Bureau of Motor Carriers, Interstate Commerce Commission, and S. G. Swain, Jr., Chief, Section of Insurance, Bureau of Motor Carriers, Interstate Commerce Commission, in an effort to have the Commission accept certificates of insurance for filing on behalf of Associated Employers Lloyds, Houston Fire & Casualty Insurance Company, and General Insurance Corporation. Such attorney was advised of the necessity of the filing of a Petition for Reconsideration and was given no assurance that if all heretofore requested information pertaining to Inland Investment Company is furnished to the Commission that certificates of insurance of the three insurance companies would be accepted. A Petition for Reconsideration of the Order of June 2, 1952, was filed by instrument

dated August 26, 1952, and the entire Interstate Commerce Commission voted to deny such Petition for Reconsideration by Order entered October 6, 1952.

Thereafter and until the issuance on November 4, 1952, of the Temporary Restraining Order by Judge Davidson, the Interstate Commerce Commission continued to refuse to accept and approve certificates of insurance when filed by Appellant in behalf of motor carriers as security for the protection of the public.

There has never been any contention on the part of the Commission that Appellant in any manner fails to provide satisfactory or adequate protection for the public.

Appellant brought this action in the United States District Court for the Northern District of Texas, Fort Worth Division, under Title 28, United States Code, Sections 1337, 1398, et seq., and Title 5, United States Code, Sections 1001, 1002 and 1009. The majority opinion of the Three-Judge District Court dismissed the Complaint for want of jurisdiction, holding that under the circumstances no necessity existed to pass on the merits of the Complaint. Judge Davidson, concurring, held that the Three-Judge District Court had jurisdiction and would dismiss the Complaint on its merits.

The Questions Are Substantial

The questions involved in this appeal are not frivolous, and no intent is had nor purpose to be served of delay by prosecuting this appeal, inasmuch as Appellant has a substantial investment in its business, the future of which is seriously threatened by the contention of the Appellees herein, thus far upheld by the Three-Judge Court.

It is the position of Appellant that the Interstate Commerce Commission has the discretionary power under Title 49, United States Code, Section 315 to make requirements of motor carriers pertaining to insurance "under such rules

and regulations as it may prescribe." The Commission has prescribed insurance rules and regulations in Part 174 of *Motor Carrier Regulations*, pursuant to numerous hearings and various reports of the Commission. However, it is undisputed that Appellant has complied with all such rules and regulations and that the only rule or regulation under which the Commission has color of authority to act as it did herein is Section 174.9, *Motor Carrier Regulations*, which empowers the Commission to accept or revoke certificates of insurance "if, in its judgment, such security does not comply with these sections or, for any reason, fails to provide satisfactory or adequate protection for the public." There is no finding nor contention on the part of Appellee, Interstate Commerce Commission, that Appellant has failed or refused "to provide satisfactory or adequate protection for the public." While the Commission may have the power under statute to prescribe rules and regulations under which it could proceed as it did here, such is not before the Court for determination herein, and, in any event, the Appellee Interstate Commerce Commission, has not elected to pursue such supposed power by the enactment of rules and regulations by virtue of which it could proceed to act as it did in its orders complained of of June 2 and October 6, 1952, in failing and refusing to accept further certificates of insurance when filed by Appellant, Houston Fire & Casualty Insurance Company, unless and until financial data to the satisfaction of Appellee Interstate Commerce Commission, was submitted on behalf of Inland Investment Company, an affiliate banking and investment corporation of Appellant Houston Fire & Casualty Insurance Company, and shown herein not to be an insurance company as contemplated by the rules and regulations of Appellee Interstate Commerce Commission.

Since the majority opinion of the Three-Judge Court dismissed the Complaint on the ground of lack of jurisdic-

tion without passing on the merits of the Complaint, the substantial questions thus presented are:

(1) Was the action of the Interstate Commerce Commission of June 2 and October 6, 1952, complained of such an "order" as contemplated by and within the meaning of Title 28, United States Code, Secs. 1336, 1398, 2321, 2324, 2325, and 2284, and by Title 49, United States Code, Secs. 17(9) and 305(g), as to vest jurisdiction in said Three-Judge Court to hear and determine the Complaint of Appellant herein?

(2) Having determined that the action of the Interstate Commerce Commission complained of was such an "order" as to vest jurisdiction in the Three-Judge Court to hear and determine such appeal, did the trial court err in failing and refusing to grant the prayer of Appellant's Petition to enjoin, set aside, and annul such orders of the Interstate Commerce Commission complained of?

(a) Jurisdiction.

The opinion of the trial court in concluding to dismiss for want of jurisdiction contends that "no case has been found which is precisely in point."[1] The trial court reasoned that

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[1] The concurrence by Judge Davidson holds jurisdiction in the trial court, predicated on *Rochester Tel. Corp.* v. *United States*, 307 U.S. 126, as comparable in fact and in law. As Judge Davidson points out, Mr. Justice Butler in his concurring opinion makes a fairly concise statement of the issue:

> "Appellant's complaint shows that prior to making its final order November 18, 1936, the Commission made general orders 1, 2, 3, 5, 6a, and 9, directing that every telephone carrier subject to the Act file statements concerning its business and affairs. Declining to recognize the Act as applying to it, appellant withheld compliance. The Commission ordered it to obey or to file answer setting forth the facts on which it relied as justification for failure so to do. . . .
>
> "These unequivocally impose upon appellant the burden and expense of preparing and reporting to the Commission a vast amount of statistical and other information.
>
> "The case presents no debatable question as to the jurisdiction of the district court."

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the action sought to be reviewed is "of less dignity than those reviewable under the settled construction of the" Urgent Deficiencies Act.

Appellant recognizes two fundamental rules of general application: (1) only final orders of administrative bodies are reviewable, and interlocutory, intermediate, and recommended orders are not reviewable; and (2) administrative remedies must be exhausted before resort to the courts. The instant proceeding meets with both of these general requirements.

Herein, Appellee Commission has directed by its order, given further finality by its subsequent order overruling a petition for reconsideration, that no further certificates of insurance shall be accepted for filing by the Commission when filed by Appellant in behalf of motor carriers as security for the protection of the public under Title 49 U. S. Code 315 unless and until certain financial data *pertaining to Inland Investment Company* is furnished to the satisfaction of the Commission. The degree of finality is present, and there is nothing interlocutory, intermediate, nor recommended involved. All administrative remedies have been exhausted.

The order which the court is here asked to review is, therefore, one which seeks review of the financial affairs of an affiliate (Inland Investment Company) of Appellant through a guise of control of Appellant and impose upon such affiliate of Appellant the burden of furnishing considerable financial data. It is, therefore, sufficiently final and definitive as to justify the court in exercising the power of review vested by statute. See *Rochester Tel. Co.* v. *U. S.*, 307 U. S. 125. In *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, Chief Justice Stone said:

> "The ultimate test of reviewability is not to be found in an over-refined technique, but in the need of the

> review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to follow."

The trial court's majority opinion cites with reliance *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, a reparations proceeding wherein the three-judge court was held not to have jurisdiction because of statutory provision excluding from its jurisdiction those cases pertaining to the enforcement of a Commission order for the payment of money. The majority therein, speaking through Mr. Justice Black, held that "the root of the controversy concerns the payment of money damages" and, hence, no jurisdiction in the three-judge court under the Urgent Deficiencies Act. The reasoning of this Court therein, however, is consistent with theory of Appellant herein as to jurisdiction. As pointed out in the dissent of Mr. Justice Frankfurter therein, with whom Mr. Justice Jackson and Mr. Justice Burton joined:

> "But the Urgent Deficiencies Act furnishes only procedural details; it merely defines the method of review and not the kind of cases for which review is available."

Hence, reference is made to Title 49 U. S. Code, Sec. 17(9) for determining whether the instant action is reviewable under the Urgent Deficiencies Act. Since this action is one to enjoin, suspend, and set aside "such decision, order, or requirement" of Appellee Commission of a definitive nature, it is one over which the three-judge court had jurisdiction.

(b) Merits.

There is no finding or contention on the part of Appellee Commission that Appellant has failed or refused "to provide satisfactory or adequate protection for the public." While Appellee Commission may have the power under statute to prescribe rules and regulations under which it could proceed as it did here, such was not before the trial court for determination and, in any event, Appellee Commission has not elected to pursue such supposed power by the enactment of rules and regulations by virtue of which it could proceed to act as it did herein. Accordingly, the purpose of Appellant by this action is to have the court condemn the action of Appellee Commission of June 2 and October 6, 1952, without regard as to the wisdom thereof.

The various Congressional acts creating administrative agencies contain sections or sub-sections giving the agencies power to make such regulations not inconsistent with law as may be necesary to carry out the provisions of said enactment. This is nothing more than a delegation to the agency of a right to establish these rules instead of Congress legislating on the matter itself. Appellant is not questioning this delegation of power, but the problem herein is whether or not, after Congress has given the agency this power, it is necessary for the agency to lay down certain rules and regulations before this delegation to them could have any practical effect. Unquestionably, the Interstate Commerce Commission could promulgate and has promulgated, such proper rules and regulations as may relate to the power of said Commission to make a determination of the ability of insurance carriers, such as Appellant herein, to furnish "satisfactory or adequate protection for the public." However, what the Appellee Commission has sought to do herein is to inquire into financial transactions

engaged in by a banking corporation affiliate of Appellant herein, and not into the financial stability of Appellant itself. Such action is without basis in statute or rules of Appellee Commission.

Appellant recognizes that the question presented is a matter of first direct impression before this Court. The Interstate Commerce Commission by its rules and regulations issued pursuant to statute has made an effort to regulate insurance carriers; however, Appellee Commission has provided a specific rule and regulation governing insurance companies and cannot so regulate them upon the basis of a rule not specified. In other words, it has issued specific regulations as to what is required of such insurance carriers, but has made no effort to seek to bring within its investigatory powers the banking affiliates of such insurance carriers, such as the Inland Investment Company herein involved.

In *Camp* v. *Herzog et al* (U. S. D. C., D. C. 1952) 104 Fed. Supp. 134, a factual situation was involved wherein plaintiff had been barred from practice for a period of two years before the National Labor Relations Board, and the action in this case was brought to obtain relief from such order. The Court, in vacating such order upon the ground that the Board had adopted no rule limiting those who appear before it as attorneys, said:

> "The rule making power is a very different thing from the adjudicatory process. It is one thing for the Congress to say that an administrative agency shall have the right to prescribe by rule for the admission and disciplinary measures of attorneys practicing before it, and quite another to say that Congress intended such an agency to adjudicate and enforce disciplinary action without any statutory provision or rule promulgated in pursuance of statutory authority. The force of this difference is readily apparent when viewed in

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> the confusing and conflicting situations that beset the whole subject of admission to and control over practice before administrative agencies.
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> • • • • •
>
> "Until the National Labor Relations Board adopts an appropriate rule, which it certainly has the power to do, the effect of which is to limit those who appear before it as attorneys, agents, or representatives to such persons as are admitted or enrolled, it holds itself out as being willing that any party at interest be represented by any person of his choice, and that no person will be precluded from being represented by the person of his choice, except in the case in which such representative has been contemptous at a hearing and except as to certain former employees."

See also *Tobin* v. *Wagner* (2 C. A. 1951), 187 Fed. 2d 977, in which Secretary of Labor sued Wagner for an injunction against violation of the Fair Labor Standards Act. Tobin claimed that employees of Defendants were within a regulation issued by the Wage & Hour Division. Wagner claimed the regulation did not so cover his employees. The Court held for Wagner stating:

> "But when the legislature delegates to an administrative official the authority, by 'sub-legislation', to issue regulations in order to fill in those gaps, then the regulations, precisely because they particularize, ought not be as generously interpreted as the statute. In fairness to the regulated, the provisions of the regulations should not be deemed to include what the administrator, exercising his delegated power might have covered but did not cover."

As hereinbefore pointed out, none of the rules and regulations adopted by the Appellee Commission contain any provision relating to the right or power of the Commission

to demand or require information relating to affiliate companies of insurance carriers, nor to any other specific powers than those enumerated in the rules of the Commission.

The reviewability of the orders complained of having been established, the substantiality of the question presented on the merits is evidenced by the following proper conclusions:

1. There is no provision in any Federal statute specifically giving the Interstate Commerce Commission jurisdiction directly over any insurance company.

2. The control of the Interstate Commerce Commission over insurance companies is indirect only through Title 49 U. S. C. A., Sec. 315 to the extent of providing security for the protection of the public.

3. The Interstate Commerce Commission is authorized by statute to prescribe rules and regulations governing the filing and approval of certificates of insurance, but has prescribed no rule or regulation which has not been met by Appellant in filing certificates of insurance with the Commission.

4. Section 174, *Motor Carrier Regulations*, relates to State authority and financial resources required of insurance carriers filing certificates of insurance with the Interstate Commerce Commission, and these requirements have been met with by Appellant.

5. While the Appellee Commission may under Section 174.9, *Motor Carrier Regulations*, refuse to accept for filing a certificate of insurance filed by an insurance carrier which "fails to provide satisfactory or adequate protection for the public", there has been no finding that Appellant has so failed and, in fact, the contrary appears to be true.

6. The entire controversy herein appears to relate to the refusal of Appellant, an insurance carrier, to furnish cer-

tain financial data pertaining to an affiliate banking corporation.

7. There is no basis in statute nor in any existing rule or regulation of the Interstate Commerce Commission requiring an insurance carrier to present financial data to the Interstate Commerce Commission pertaining to banking corporation affiliates as a condition precedent to the acceptance of its certificates of insurance for filing with the Interstate Commerce Commission.

8. In the absence of a specific statutory provision or a reasonable rule or regulation promulgated pursuant to statute, the Commission has no power to require financial data pertaining to affiliates of insurance carriers.

9. In the absence of an amendment to the statute or the existing rules and regulations of the Appellee Commission, the Commission has no power nor authority to refuse to accept for filing certificates of insurance filed on behalf of a motor carrier by an insurance company as security for protection of the public except in accordance with the specific standards set forth in the Commission's rules and regulations.

10. While the Interstate Commerce Commission in its various reports has given detailed consideration to the requirements to be imposed upon an insurance company as a condition to the acceptance by the Interstate Commerce Commission of certificates of insurance when filed on behalf of motor carriers, it has recognized that in view of its present lack of funds and facilities for investigating and controlling insurance company practices generally, it has no presently feasible and valid way of "giving weight to the elements which make for stability of insurance institutions, other than minimum capital and policyholders' surplus, following some certain method as is used in rating

insurance company institutions by the Alfred M. Best Company of New York . . ." (18 MCC 131 at 136-138).

11. In the various reports of the Interstate Commerce Commission pertaining to *Motor Carrier Insurance For Protection of the Public*, 1 MCC 45, 6MCC 407, 12 MCC 413, 18 MCC 131, 22 MCC 350, 43 MCC 355, and 52 MCC 613, the Interstate Commerce Commission has consistently held that it can regulate insurance companies only through the medium of the promulgation of reasonable rules and regulations. In the instant situation, it has gone far beyond those expressed views of its powers and taken from Appellant its right to do business upon an expressed ground not found in any statute nor in any rule or regulation of the Interstate Commerce Commission.

12. The Interstate Commerce Commission has been unable to specify any rule or regulation of the Interstate Commerce Commission or any statute which Appellant has violated.

13. Appellant is entitled to a permanent injunction prohibiting Appellee Interstate Commerce Commission from refusing to accept for filing certificates of insurance filed by Appellant, as security for the protection of the public when filed in behalf of motor carriers under Title 49 U. S. C. A., Sec. 315, and mandatorily directing and commanding Appellee Interstate Commerce Commisison to accept said certificates of insurance for filing.

14. Appellant is entitled to have the orders of June 2 and October 6, 1952, complained of, annulled, enjoined, cancelled, and set aside, and to have the Interstate Commerce Commission and the United States of America permanently enjoined and restrained from enforcing or recognizing said orders and from refusing to accept and approve further certificates of insurance from Appellant as security for the

protection of the public when filed in behalf of motor carriers under Title 49 U. S. C. A., Sec. 315.

Respectfully submitted,

REAGAN SAYERS,
J. A. GOOCH,
Counsel for Appellant.

RAWLINGS, SAYERS, SCURLOCK & EIDSON,
CANTEY, HANGER, JOHNSON, SCARBOROUGH & GOOCH,
of Counsel.

APPENDIX "A"

[Title omitted]

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS—Filed February 11, 1953

HUTCHESON, *Chief Judge*, Circuit Court.

In this case the Houston Fire and Casualty Insurance Company as complainant brought this action against the ICC and others to annul, set aside, and enjoin an action of the Interstate Commerce Commission in refusing to approve the complainant or to accept certificates of insurance from the complainant as surety for the protection of the public in connection with the work of a motor carrier.

The complainant had been operating and its contracts had been heretofore accepted by carriers and approved by the Interstate Commerce Commission.

The complainant was a member or subsidiary of the Associated Employers Lloyds. Lloyds owned all the capital stock of the Inland Investment Company. All of the capital stock of the Houston Fire and Casualty Insurance Company is owned by the Inland Investment Company. All of the capital stock of the General Insurance Corporation is in turn owned by the complainant, Houston Fire and Casualty Insurance Company.

In its examination report of Lloyds under date of December 31, 1950, the Department of Insurance of the State of Texas set forth in part certain practices of these companies as follows:

> "It is the practice of the Lloyds to make substantial loans to its wholly owned subsidiary, Inland Investment Company. It is the further practice for the Lloyds to receive payment of the loans in late December and re-loan the funds in early January. The above total (referred to commercial notes in the total of $20,750.00) represents the balance remaining in the account at December 31, 1950.
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> "On December 31, 1950, the Inland Investment Company repaid $1,000,000.00 of such loan. The Lloyds

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invested the $1,000,000.00 in Federal Government Bonds. Inland Investment Company obtained the $1,000,000.00 with which to repay the loans from a Dallas bank. In January 1951, the Lloyds sold the bonds, reloaned the $1,000,000.00 to the Inland Investment Company, and the latter Company repaid the note to the Dallas bank. The cancelled note to the bank was inspected. It provided for interest at the rate of 1½% and was due January 5, 1951. A note was made by the Inland Investment Company bearing no endorsements."

At a session of the Interstate Commerce Commission, Division 5, held at the office in Washington, D. C. on June 2, 1952, it was voted not to accept further certificates from the insurers until furnished with statements satisfactorily explaining their financial transactions. This request was set forth by letter of Director W. Y. Blanning to J. M. Ferguson, president of the complainant company, in which it was stated in part:

"With reference to my letter of February 11 requesting copies of the annual statements for the year 1951 of Associated Employers Lloyds, the Houston Fire and Casualty Insurance Company and the General Insurance Corporation, together with copy of a financial statement of the Inland Investment Company, this is to acknowledge receipt of the copies of the insurance company statements. However, we have not received copy of the financial statement of the Inland Investment Company....

"Since Associated Employers Lloyds owns all of the outstanding stock of the Houston Fire and Casualty Insurance Company, which, in turn, owns all the outstanding stock of General Insurance Corporation, the statement of Inland Investment Company is necessary to an understanding of the collective statements of the three insurance companies ....

"The purpose of this letter is not to indicate that this Bureau is now of the opinion that any of the three insurance companies are in an unsound financial condi-

tion . . . . In order that this Bureau may properly discharge its responsibilities to the Commission in respect of advising it as to the stability of insurance companies filing certificates of insurance with it as security for the protection of the public, I feel that we should know more of the actual facts than we now do. In order that we may be placed in that position, it is requested that you arrange to furnish us with the copy of the financial statement of Inland Investment Company which will show its assets and liabilities in detail, including a detailed description of all of its investments and the nature and amounts of all its liabilities, especially those which it may have to Associated Employers Lloyds and the other two insurance companies forming a part of the corporate enterprise.'[7]

The request was complied with as to the other companies, but not as to the Inland Investment Company, which the complainant refused to file. The Interstate Commerce Commission taking the position that since the Inland Investment Company owned the complainant that it was within its legal rights under Sec. 315, Title 49 USCA[1] and its rules[2] in asking for information about such company,

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[1] Title 49, Section 315 U.S.C.A. provides among other things:

"The Commission may, in its *discretion* and under such rules and regulations as it shall prescribed, require any such common carrier to file a surety bond, policies of insurance, qualifications as a self-insurer, or other securities or agrements, in a *sum* to be determined by the Commission, to be conditioned upon such carrier making compensation to shippers and/or consignees for all property belong(ing) to shippers and/or consignees, and coming into the possession of such carrier in connection with its transportation service."

[2] The rules of the Interstate Commerce Commission provide among other things:

"174.8 *Financial resources.* Each insurance company must possess the minimum financial resources applicable to it as provided in this paragraph which minimum will be determined on the basis of values of assets and liabilities as shown in its financial statements filed with and approved by the insurance department or other insurance regulatory authority of the state of domicile (home state) of such company, except in instances where, in the judgment of the

when the request went unanswered and the information was not furnished, it refused to approve any further certificates of insurance by the complainant.

Feeling that the action of the Commission in requesting the information from the affiliate was arbitrary and outside of its powers, and that it amounted to an order reviewable in this court, the plaintiff brought this action to set aside the Commission's determination, invoking in doing so the jurisdiction conferred by the Judicial Code of 1948, which integrated the provisions formerly contained in the Urgent Deficiencies Act of 1913 into the Revised Code, namely Title 28, Sections 1336, 1398, 2321, 2322, 2323, 2324, 2325, and 2284. These sections of the code vest in a specially constituted three-judge district court the jurisdiction to set aside "any order" of the Interstate Commerce Commission where it is found that such "order" is illegal or void for any reason under established principles of law. Venue is specially placed in the district where the plaintiff resides. Title 28, Section 1258, which was also taken from the Urgent Deficiencies Act, provides that a direct appeal will lie from the district court's decision to the Supreme Court.

By motion made returnable on Dec. 18, 1952, the United States moved to dismiss the action on the ground that the action of the Interstate Commerce Commission complained of in the complaint was not an "order" of the Commission within the meaning of that term in the statutes

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Commission, additional evidence with respect to such values is considered necessary.

"174.9 *Refusal to accept or revocation by the Commission of surety bond, etc.* The Commission may, at any time, refuse to accept or may revoke its approval of any surety bond, policy of insurance (or certificate of insurance in lieu thereof), qualifications as a self-insurer, or other securities or agreement if, in its judgment, such security does not comply with these sections or, for any reason, fails to provide satisfactory or adequate protection for the public."

involved, but was a preliminary action not subject to review under established doctrines.

The plaintiff vigorously contesting this view, the motion was taken with the case, and both motion and merits were fully argued.

After careful study and full consideration of the questions raised by the motion, in the light of the record and the arguments and authorities presented for and against it, a majority of the court has reached the conclusion that the motion is well taken, that this court does not have jurisdiction of the action, and accordingly, without consideration of the merits, should dismiss it.

While no case has been found which is precisely in point, it is the opinion of the court that if the plaintiff is entitled to any relief it would be in the District Court of the District of Columbia by an action for mandatory injunction in the nature of mandamus, directing the commissioner to go forward with the determination of its qualifications under the terms and conditions which may be prescribed in the decree.

In United States v. Griffin, 303 U.S. 232, the court dismissed an action to set aside a determination of the commission, relating to railway mail pay, for want of jurisdiction, and, in so doing, traced the history of the act and made the following observations with respect to the limited jurisdiction conferred:

> "The Urgent Deficiencies Act provides a method of judicial review of orders of the Interstate Commerce Commission possessing the following extraordinary features:
>
> (1) The original hearing in the district court is not before a single judge, but before three, of whom one must be a circuit judge; (2) From the decree of the district court as so constituted a direct appeal to the Supreme Court is granted as of right, instead of

a review by a circuit court of appeals; (3) Upon both the trial court and the Supreme Court rests the obligation to give precedence over others. These features were first introduced by the Expediting Act of 1903, 32 Stat. 823, for suits by the United States to enforce the antitrust and commerce laws. They were extended by the Hepburn Act of 1906, Sec. 5, 34 Stat. 584, 590, 592 to suits to enforce or to set aside orders of the Interstate Commerce Commission. When that jurisdiction was vested in the Commerce Court provisions with like effect were provided for cases coming before it. 36 Stat. 539. To its jurisdiction the district court succeeded, with these features, under the Urgent Deficiencies Act.

"In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof. In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays ordinarily incident to litigation. In construing the Act, this Court concluded that despite the broad language used in the Commerce Court Act, Congress could not have intended to include in this special jurisdiction suits to set aside every kind of order issued by the Commission. For substantially every decision, and every other kind of action by the Commission is expressed in, or is followed by, an order; and many of the orders are obviously not of such public importance and widespread effect as to justify, in cases affecting them, the extraordinary features of the Urgent Deficiencies Act."

Similarly, in the recent case of United States v. I.C.C., 337 U.S. 418, the Court again had occasion to review the history of the statutes and pointed to the policy of narrowly construing them. Mr Justice Black stated at page 426:

"We have frequently pointed out the importance of limiting the three-judge court procedure within its

> expressly stated confines. We are confident that in holding that one judge rather than three should entertain cases challenging Commission reparation orders we interpret the congressional expediting procedure and the Interstate Commerce Act in accordance with their basic purpose."

Under this prevailing doctrine, the courts have consistently held that jurisdiction to review orders of the commission do not authorize review of preliminary or interlocutory action of the type involved in the case at bar. The reason for this is the requirement that the administrative remedies should be exhausted and administrative determination arrived at on the merits before resort to the court. This is especially true of investigative steps, such as the one in this case, preliminary to a determination of the matter investigated. See Davis, Administrative Law, Sec. 196; United States v. Illinois Central Railroad Co., 244 U.S. 82; and Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375, in which at page 385, the court said:

> "The provision for review thus relates to orders of definitive character dealing with the merits of a proceeding before the commission and resulting from a hearing upon evidence and supported by findings appropriate to the case."

Cf. Title 5, Section 1001, paragraph (d).

In the instant case it is undisputed that the commission has made no determination whatsoever with respect to the ultimate suitability of the plaintiff as an insurer of motor vehicles subject to the Act. No determination has been made that it is financially unsound or that it is poorly managed or that for any reason whatsoever it is not qualified to supply insurance adequate for the protection of the public. The Commission has simply determined that in order for it to completely evaluate the company it is necessary for it to explore and examine the financial position

and various financial transactions of the parent company. Hence it requested the additional information, which is the subject of the dispute, as a condition to the exercise of its discretion. Whether this request is reasonable or not is beside the point insofar as this motion is concerned. When the plaintiff refused to furnish the information the administrative process, of necessity, stopped short of the full determination which is contemplated under the statutes conferring the power of judicial review on this court.

In looking at this impasse between the plaintiff and the commission it should always be borne in mind that it is the plaintiff who is asking a certain privilege from the commission. The whole proceeding is instituted by the plaintiff and not by the commission. The refusal of the commission to further entertain the plaintiff's application without the information requested in no way affects the plaintiff's right to issue insurance in any place that the law permits. It simply does not have the privilege of insuring carriers subject to the Interstate Commerce Act until the commission's approval has been obtained as required by the Act.

It should likewise be borne in mind, had the plaintiff so elected, that it could have supplied the requested information under objection and if the commission, relying wholly or in part upon this information, held that the plaintiff was unqualified, an action could be brought in this court to set aside this final determination and the issue of the relevancy of the requested materials and the reasonableness of the commission's request would be traversed. For reasons best known to itself, the plaintiff has elected to take its stand as a preliminary stage of the proceeding. Having done so, it cannot invoke the jurisdiction of this court under the uniform construction of the statutes conferring jurisdiction.

Plaintiff's reliance on Rochester Telephone Co. v. United States, 307 U. S. 125, as abrogating the rule so clearly set forth in the Edison case, will not, we think, do. In the opinion of Mr. Justice Frankfurter, which is a complete review of the whole field of the law relating to judicial review of administrative agencies, he cites both the Edison and the Illinois Central cases as sound illustrations of the well accepted rule that preliminary action will not be reviewed.

Neither, in our opinion, is the complainant justified in its claim that Sec. 17, par. 9 of the Interstate Commerce Act [3] has the effect of abrogating the Edison Rule and of broadening this court's jurisdiction so that it could review actions of the commission of less dignity than those reviewable under the settled construction of the act.

Since its enactment, Sec. 17, par. 9 has been before the courts on a number of occasions and in none of them has it been intimated that the purpose and effect of the act is as contended by plaintiff.

The complaint is dismissed for want of jurisdiction in this court to hear it and without prejudice to plaintiff's right to proceed elsewhere as it may be advised.

(S.) JOSEPH C. HUTCHESON, JR.,
United States Circuit Judge;
(S.) WM. H. ATWELL,
United States District Judge;
T. WHITFIELD DAVIDSON,
United States District Judge.

I concur in the ultimate result of this decision. Instead of dismissing the case on the motion I would decide it upon the merits. The complainant was surety on bonds for carriers. The ICC called for a financial statement which the complainant refused to supply. Whereupon it was denied the right to make any further surety bonds for carriers operating under the supervision of the ICC.

The request of the Commission and the order issued thereon was reasonable. So finding, it is immaterial as far as the complainant is concerned that more be said.

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[3] This section provides:

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the commission, but not otherwise.

Our preference for the merits over the motion as a basis for our decision lies in the fact that we think the order of the Commission was final in its character and we think it was an order of the Commission in its official capacity and not a capricious act of its members. There may be a dearth of authority on this particular point, but we think there is much in the Rochester case [1] calculated to shed light upon the issue. Mr. Justice Frankfurter says: "At the outset a challenge to the jurisdiction of the District Court confronts us.[2] In his concurrence in the Frankfurter decision Mr. Justice Butler makes a fairly concise statement of that issue:

> "Appellant's complaint shows that prior to making its final order November 18, 1936, the commission made general orders 1, 2, 3, 5, 6a, and 9, directing that every telephone carrier subject to the Act file statements concerning its business and affairs. Declining to recognize the Act as applying to it, appellant withheld compliance. The commission ordered it to obey or to file answer setting forth the facts on which it relied as justification for failure so to do. * * *
>
> "These unequivocally impose upon appellant the burden and expense of preparing and reporting to the commission a vast amount of statistical and other information.
>
> "The case presents no debatable question as to the jurisdiction of the district court." [3]

Whether this case goes off on the motion to dismiss for want of jurisdiction or whether it goes off on the merits, as we have indicated, the effect is to deny the complainant the right of recovery; hence our concurrence.

(S.) T. WHITFIELD DAVIDSON,
United States District Judge.

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[1] *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125.

[2] *Rochester Tel. Corp.* v. *United States*, 307 U.S. 126.

[3] *Rochester Tel. Corp.* v. *United States*, 307 U.S. 146, 147.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

[Title omitted]

FINAL DECREE—Filed April 21st, 1953

This cause having come on for final hearing on the 18th day of December, 1952, whereupon came the parties by their respective counsel and announced ready for trial; and the pleadings, evidence and argument of counsel having been submitted, the Court took the cause under advisement, and after full consideration having filed its opinion herein, it is

Ordered, Adjudged and Decreed that the complaint be and it is hereby dismissed for want of jurisdiction in this Court to hear it and without prejudice to plaintiff's right to proceed elsewhere as it may be advised.

Entered this 14 day of April, 1953.

(S.) JOSEPH C. HUTCHESON, JR.,
United States Circuit Judge,
United States Court of Appeals,
Fifth Circuit;

(S.) WM. H. ATWELL,
United States District Judge,
Northern District of Texas;

(S.) T. WHITFIELD DAVIDSON,
United States District Judge,
Northern District of Texas.

APPENDIX "B"

APPLICABLE SECTIONS OF THE UNITED STATES CODE, TITLES 5, 28 AND 49

Title 28 U. S. C., Sec. 1336:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

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Title 28 U. S. C., Sec. 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Title 28 U. S. C., Sec. 1398:

"Except as otherwise provided by law, any civil action to enforce, suspend, or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

Title 28 U. S. C., Sec. 2321:

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter. The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States."

Title 28 U. S. C., Sec. 2324:

"The pendency of an action to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action."

Title 28 U. S. C., Sec. 2325:

"An interlocutory or permanent injunction restraining the enforcement, operation, or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this Title."

Title 49, U. S. C., Sec. 17(9):

"When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to a matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

Title 49 U. S. C., Sec. 305(g):

"Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I: Provided, That where the Commission in respect of any matter arising under this Part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States convened under Section 2284 of Title 28 of the United States Code, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction."

Title 49 U. S. C., Sec. 305(h):

"All the provisions of section 17 of Part I shall apply to all proceedings under this part."

Title 49 U. S. C., Sec. 315:

"No certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules or regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities and agreements, in such reasonable amount as the Commission may require, conditioned to pay,

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within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit, or for loss or damage to property of others. The Commission may, in its discretion and under such rules and regulations as it shall prescribe, require any such common carrier to file a surety bond, policies of insurance, qualifications as a self-insurer, or other securities or agreements, in a sum to be determined by the Commission, to be conditioned upon such carrier making compensation to shippers and/or consignees, and coming into the possession of such carrier in connection with its transportation service. Any carrier which may be required by law to compensate a shipper and/or consignee for any loss, damage, or default for which a connecting motor common carrier is legally responsible shall be subrogated to the rights of such shipper and/or consignee under any such bond, policies of insurance, or other securities or agreements, to the extent of the sum so paid."

Title 5, U. S. C., Sec. 1001(c); Sec. 1001(d); Sec. 1001(e):

"(c) 'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, practice requirements of any agency, and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor, or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. 'Rulemaking' means agency process for the formulation, amendment, or repeal of a rule.

"(d) 'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rulemaking, but including licensing. 'Adjudication' means agency process for the formulation of an order.

"(e) 'License' includes the whole or any part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification or condition of a license."

Title 5, U. S. C., 1002(a) provides:

"Every agency shall separately state and currently publish in the Federal Register . . . (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

Title 5, U. S. C., Sec. 1009(e):

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning for applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside any agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 or otherwise review on the record of an agency hearing provided by statute; or (6) unwarranted

by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."